KAREN P. HEWITT
United States Attorney
THOMAS C. STAHL
Assistant United States Attorney
Chief, Civil Division
CINDY M. CIPRIANI
Assistant United States Attorney
California Bar Number: 144402
880 Front Street, Room 6293
San Diego, California 92101
Telephone:(619) 557-7390
E-Mail: Cindy.Cipriani@usdoj.gov

PETER D. KEISLER
United States Department of Justice
Assistant Attorney General, Civil Division
VICTOR M. LAWRENCE, DC 449052
Senior Litigation Counsel
Office of Immigration Litigation
SAMUEL P. GO, NYSBN 4234852
Trial Attorney
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 353-9923
Fax Number: (202) 233-0397
Email: samuel.go@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ISAAC KIGONDU KINITI, et al., Plaintiffs, v. JULIE L. MYERS, et al., Defendants.	Case No. 3:05-cv-1013-DMS-PCL **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**[1]

[1] This motion to dismiss is filed on behalf of the Federal Defendants. The United States does not represent defendants Corrections Corporation of America (CCA), Joe Easterling, or Charles Howard in this matter.

INTRODUCTION AND BACKGROUND

This case began on May 9, 2005, when plaintiff Isaac Kigondu Kiniti ("Kiniti") filed a *pro se* Complaint, alleging, among other things, constitutional violations stemming from the overcrowding of U.S. Immigration and Customs Enforcement (ICE) detainees housed at the San Diego Correctional Facility (SDCF), a contract detention facility in Otay Mesa, California, operated by CCA. The initial Complaint named CCA, the warden of the facility, and several SDCF officers as defendants. The Court reviewed the Complaint on its own initiative, dismissed a number of claims without prejudice, and dismissed several named defendants. The Court also granted Kiniti leave to file an amended complaint and instructed him to identify those defendants to whom he had complained regarding the conditions of his confinement. On June 29, 2006, Kiniti, still *pro se*, filed his First Amended Complaint, and the original defendants filed an Answer on October 30, 2006.

On January 24, 2007, Kiniti, now represented by the ACLU, filed a motion for leave to file his Second Amended Complaint, wherein he requested certification of a class in addition to both declaratory and injunctive relief on behalf of the ICE immigration detainees housed at SDCF. The new complaint added plaintiffs and replaced almost all of the defendants, substituting four ICE officials and the current warden and assistant warden of SDCF as the related SDCF officers, and replacing the former warden as a named defendant. The Second Amended Complaint also alleges for the first time that defendants engaged in the practice of overcrowding and triple-celling immigration detainees at SDCF. According to plaintiffs, this practice results in the violation of the immigration detainees' constitutional rights. On February 27, 2007, the Court granted plaintiffs' motion for leave to file the Second Amended Complaint, and the Second Amended Complaint was deemed filed on that date.[2]

The Court initially addressed the issue of mootness in its February 27, 2007 order, when the Court addressed defendants' argument that amending the First Amended Complaint was futile because, among other things, plaintiffs were no longer subject to triple-celling conditions and

---

[2] While Kiniti's litigation has been ongoing for some time, the Federal Defendants were not a party to this lawsuit until February 27, 2007, when the Second Amended Complaint was deemed filed.

therefore lacked standing to bring suit. See Order Granting Plaintiff's Motion to Amend First Amended Complaint and Add Parties ("Order") at 4. The Court granted leave to file the Second Amended Complaint, noting that "Defendants' argument that Plaintiffs' claims are moot assumes the injuries alleged stem solely from "triple-celling," and the Court found that "[t]his is not the case." Id. As the Court explained, plaintiffs' proposed Second Amended Complaint alleges a "chronic and severe overcrowding" that includes not only triple-celling, but allegations that immigration detainees were forced to sleep on makeshift beds in the common dayroom space; that detainees experienced overcrowding in holding cells; and that overflow detainees and detainees who refuse to be triple-celled are subject to oppressive confinement conditions in the administrative segregation unit. Id. The Court also noted that while defendants claimed that 104 detainees were permanently discharged or transferred from SDCF, defendants did not contend that the individual pods did not exceed their capacity. Id. at 5.

Furthermore, the Court stated, defendants did not meet their "heavy burden of persuading" the Court that triple-celling cannot reasonably be expected to start up again. Id. Citing the case of Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc., 528 U.S. 167, 189 (2000), the Court reasoned that while a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice, "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not be reasonably expected to occur." Applying this standard, the Court held that defendants' assertion that no detainees are currently triple-celled failed to establish that it was absolutely clear that the triple-celling and other conditions related to overcrowding could not be reasonably expected to recur. Id.

In contrast, this present motion to dismiss based on mootness is distinguishable from this prior argument opposing the Motion for Leave to File the Second Amended Complaint. First, defendants address not only the triple-celling allegations, but the other allegations referenced in the Court's February 27, 2007 Order that relate to issues of overcrowding. Second, defendants meet the Friends of the Earth standard in showing that plaintiffs' case is moot by making it "absolutely clear" that the challenged conduct alleged in the Second Amended Complaint could not reasonably be expected to recur.

Since late January 2007 -- prior to the filing of the Second Amended Complaint -- and thereafter, the number of ICE detainees housed at SDCF per day has fluctuated between 595 to 692.[3] Declaration of Timothy L. Perry (Perry Decl.) at ¶ 17. Plaintiffs, in the Second Amended Complaint, allege that SDCF's "design capacity" for ICE immigration detainees is 800. Id. at ¶ 16; Second Amended Complaint at ¶¶ 47, 51. Thus, since late January, 2007, SDCF has been operating below capacity by plaintiffs' standards, and is not "overcrowded." Perry Decl. at ¶ 18.

Furthermore, since late January 2007, there has been no triple-celling of any of the ICE immigration detainees at SDCF, nor has there been any situation akin to "severe and chronic overcrowding." Id. at ¶¶ 18, 19. Since late January 2007, no "boats" have been used for ICE immigration detainees, and no immigration pod, administrative segregation unit or holding cell has exceeded capacity. Id. at ¶ 20, 26. Finally, no ICE immigration detainees are forced to sleep on "makeshift beds" in the common day rooms at SDCF, though as of May 1, 2007, 11 ICE immigration detainees in the facility slept on common area bunk beds in the day room. Id. at ¶¶ 22, 23. As of May 3, 2007, no immigration detainees were assigned to bunk beds located in day rooms. Id. at ¶ 23. As the conditions alleged by plaintiffs do not and have not existed since one month prior to the time the plaintiffs' Second Amended Complaint was filed, there is no live controversy for the court to resolve. Thus, and as explained more fully below, plaintiffs' claims are moot, and this case should be dismissed.

ARGUMENT

I. THIS CASE SHOULD BE DISMISSED AS MOOT SINCE NO "TRIPLE-CELLING" OR OVERCROWDING HAS EXISTED AT ANY TIME SINCE WELL BEFORE THE SECOND AMENDED COMPLAINT WAS FILED.

A. The Standard for Mootness

Generally, "a case becomes moot 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" Murphy v. Hunt, 455 U.S. 478, 481 (1982) (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980)); see McBride Cotton

[3]There are frequently differences between the counts generated by both ICE and CCA, largely as a result that ICE generates its counts at 6:30 a.m. on a given day, while CCA generates its count at 11:59 p.m. that night.

and Cattle Corp. v. Veneman, 290 F.3d 373 (9th Cir. 2002); H.C. ex rel Gordon v. Koppel, 203 F.3d 610, 612 (9th Cir. 2000). Addressing each of these prongs in turn, the present case is moot because the issues presented are not live and have not been live since before the Second Amended Complaint was filed. See Herman v. Tidewater Pacific, Inc., 160 F.3d 1239 (9th Cir. 2002). There is no live controversy regarding plaintiffs' claims, as the alleged practice of "triple-celling" or "severe and chronic overcrowding" do not exist at SDCF. Perry Decl. at ¶¶ 18, 19. "Generally, an action is mooted when the issues presented are no longer live and therefore the parties lack a legally cognizable interest for which the courts can grant a remedy." Oregon Advocacy Center v. Mink, 322 F.3d 1101 (9th Cir. 2003) (citing Alaska Ctr. for Env't v. United States Forest Serv., 189 F.3d 851, 854 (9th Cir. 1999)); see also Clark v. City of Lakewood, 259 F.3d 996, 1011 (9th Cir. 2001). A case becomes moot when interim relief or events have deprived the court of the ability to redress the party's injuries. Cook Inlet Treaty Tribes v. Shalala, 166 F.3d 986 (9th Cir. 1999) (citing United States v. Alder Creek Water Co., 823 F.3d 343, 345 (9th Cir. 1987)). See also Demery v. Arpaio, 378 F.3d 1020, 1025-26 (9th Cir. 2004) ("[A] suit for injunctive relief is normally moot upon the termination of the conduct at issue . . ."). Here, as of late January 2007, SDCF has not "triple-celled" any ICE immigration detainees and has not housed more than 692 ICE immigration detainees at one time at the facility. Perry Decl. at ¶¶ 17, 19. Also, since late January 2007 no "boats" have been used for ICE immigration detainees, and no immigration pod, administrative segregation unit or holding cell has exceeded capacity. Id. at ¶¶ 20, 26. Furthermore, since late January 2007 no ICE immigration detainees are forced to sleep on "makeshift beds" in the common day rooms at SDCF, though as of May 1, 2007, 11 ICE immigration detainees in the facility slept on common area bunk beds in the day room. Id. at ¶¶ 22, 23. As of May 3, 2007, no immigration detainees were assigned to bunk beds located in day rooms. Id. at ¶ 23. As the conditions alleged by plaintiffs in the Second Amended Complaint do not and have not existed since one month prior to the time the Second Amended Complaint was filed, there is no live controversy for the Court to grant plaintiffs' requests for relief.

B. Plaintiffs Fail to Meet the Exception to Mootness

The Supreme Court has "recognized an exception to the general rule [of mootness] in cases that are 'capable of repetition, yet evading review.'" Murphy, 455 U.S. at 482.

> [I]n the absence of a class action, the capable of repetition yet evading review doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

Id.; see also Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1098 (9th Cir.2000). "[A] mere physical or theoretical possibility" is insufficient to satisfy the test; [r]ather, . . . there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." Murphy, 455 U.S. at 482; see also Demery, 378 F.3d at 1027. The Court has "generally . . . been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." Honig v. Doe, 484 U.S. 305, 320 (1988) (citing Los Angeles v. Lyons, 461 U.S. 95, 105-106 (1983) (no threat that party seeking injunction barring police use of chokeholds would be stopped again for traffic violation or for another offense, or would resist arrest if stopped); Murphy, 455 U.S. at 484 (no reason to believe that party challenging denial of pre-trial bail "will once again be in a position to demand bail"); O'Shea v. Littleton, 414 U.S. 488, 497 (1974) (unlikely that parties challenging discriminatory bond-setting, sentencing, and jury-fee practices would again violate valid criminal laws).

In Demery v. Arpaio, the Ninth Circuit held that while a suit for injunctive relief is normally moot upon the termination of the conduct at issue, such a claim is not moot if there is a likelihood of recurrence. Demery, 378 F.3d at 1025-26; Fed. Trade Comm'n v. Affordable Media, LLC, 179 F.3d 1228, 1238 (9th Cir. 1999) (holding that injunctive relief does not become moot by defendants' voluntary cessation of allegedly wrongful behavior unless it is "absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur") (quoting Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260, 1274 (9th Cir.1998)); In Demery, the Ninth Circuit determined that the plaintiffs' lawsuit seeking a preliminary injunction barring the use of "webcams" in a prison was not moot, based on the defendant sheriff's "unequivocal" representations and actions indicating that he would reactivate the webcams if the injunction was vacated. Demery, 378 F.3d at 1026. In stark contrast, the defendants in the present case explicitly affirm that the alleged wrongful behavior is not reasonably expected to recur. See Perry Decl. at ¶¶ 21, 24-26. Defendants do not reasonably expect to engage in the practice of triple-celling the immigration detainees at SDCF and do not

reasonably expect to significantly increase operation above current levels. Id. at ¶ 21. This expectation is reasonable based on the fact that much of the triple-celling alleged in the Second Amended Complaint was the immediate result of a loss of bed space due to San Diego County's requiring the facility to provide the county with 200 beds. Id. at ¶ 14. As a result, CCA needed to find a method of housing the immigration detainee population affected by this change. Id. There is also no reasonable expectation that "boats" will be used for ICE immigration detainees at SDCF, or that any immigration pod, administrative segregation unit or holding cell will exceed ICE's capacity. Id. at ¶ 21, 26. Finally, there is no reasonable expectation that ICE immigration detainees will be forced to sleep on "makeshift beds" in the common day rooms at SDCF. Id. at ¶ 24.

Thus, for all of the reasons mentioned above, there is no "reasonable expectation" or "demonstrated probability" that meets the standard for plaintiffs' claims to be considered capable of repetition.[4] There is no longer a "live" controversy affecting plaintiffs, and plaintiffs lack a legally cognizable interest in the outcome. Plaintiffs' claims are moot, and this case should be dismissed.

///

///

[4] Defendants do not concede that plaintiffs satisfy the first prong of the exception, but note that both prongs are necessary to meet the test for exception to the mootness doctrine, and plaintiffs cannot meet both prongs.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action as moot.

DATED: May 4, 2007

Respectfully submitted,

For Defendants:

KAREN P. HEWITT
United States Attorney
THOMAS C. STAHL
Assistant U.S. Attorney
Chief, Civil Division
CINDY M. CIPRIANI
Assistant U.S. Attorney

PETER D. KEISLER
Assistant Attorney General Civil Division
DAVID J. KLINE
Principal Deputy Director
VICTOR M. LAWRENCE
Senior Litigation Counsel

s/ Samuel P. Go
SAMUEL P. GO
Trial Attorney
U.S. Department of Justice Civil Division
Office of Immigration Litigation
P.O. Box 878,
Ben Franklin Station
Washington, D.C. 20044
(202) 353-9923

CERTIFICATE OF SERVICE

The undersigned certifies that on this 4th day of May 2007 a true and correct copy of the foregoing Defendants' Motion to Dismiss was served by ECF Filing on all counsel of record.

Gouri Bhat, Esq.
American Civil Liberties Union Foundation
National Prison Project
915 15th Street, NW
7th Floor
Washington, DC 20005-2112
Gbhat@npp-aclu.org

Anthony Michael Stiegler
Cooley Godward Kronish
4401 Eastgate Mall
San Diego, CA 92121-9109
stiegleram@cooley.com

David Fathi
American Civil Liberties Union Foundation
National Prison Project
915 15th Street, NW
7th Floor
Washington, DC 20005-2112
dfathi@npp-aclu.org

John David Blair-Loy
ACLU of San Diego and Imperial Counties
P.O. Box 87131
San Diego, CA 92138
dblairloy@aclusandiego.org

Mary Kathryn Kelley
Cooley Godward Kronish
4401 Eastgate Mall
San Diego, CA 92121-9109
mkkelley@cooley.com

Tom-Tsvi M. Jawetz
American Civil Liberties Union Foundation
National Prison Project
915 15th Street, NW
7th Floor
Washington, DC 20005-2112
tjawetz@npp-aclu.org

Christopher G. Stuart
Jones Shelton and Hochuli
2901 North Central Avenue
Suite 800
Phoenix, AZ 85012
cstuart@jshfirm.com

Daniel P. Struck
Jones Shelton and Hochuli
2901 North Central Avenue
Suite 800
Phoenix, AZ 85012
dstruck@jshfirm.com

Russell R. Yurk
Jones Shelton and Hochuli
2901 North Central Avenue
Suite 800
Phoenix, AZ 85012
ryurk@jshfirm.com

Rachel Love Halvorson
Jones Shelton and Hochuli
2901 North Central Avenue
Suite 800
Phoenix, AZ 85012
rhalvorson@jshfirm.com

David B. Monks
Klinedinst PC
501 West Broadway
Suite 600
San Diego, CA 92101-3544
dmonks@klinedinstlaw.com

Micaela P. Shelton
Klinedinst PC
501 West Broadway
Suite 600
San Diego, CA 92101-3544
mshelton@klinedinstlaw.com

/s/ Samuel P. Go

U.S. Department of Justice